Filed 2/18/20 P. v. Sheppard CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL OLIVER SHEPPARD, Defendant and Appellant.	H045521 (Santa Clara County Super. Ct. No. F1347150)

I. INTRODUCTION

Defendant Michael Oliver Sheppard appeals after a jury found him guilty of second degree murder (Pen. Code, § 187).[1] The trial court sentenced defendant to 15 years to life.

Defendant contends that the trial court improperly excluded impeachment evidence under Evidence Code section 352 and violated his Sixth Amendment right to confront witnesses against him. In addition, defendant requests this court to conditionally reverse the judgment and remand the matter to the trial court for a determination of his eligibility for mental health diversion pursuant to section 1001.36.

For reasons that we will explain, we will affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise specified.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Evidence*

Bertha Paulsen lived in a homeless encampment in Morgan Hill. The encampment was close to defendant's apartment, and defendant and Paulsen were friends. Sometimes Paulsen stayed at defendant's apartment.

On June 15, 2013, Salvador Perez Saavedra[2] and defendant were drinking whiskey at defendant's apartment. Paulsen and Juan Miraya were also there. Defendant began smoking marijuana and accusing Paulsen of stealing $60 from him. They started to argue. At some point when defendant and Paulsen were in the bedroom, Saavedra heard both of them screaming, defendant hitting Paulsen, and Paulsen crying out. Saavedra told defendant, " 'Hey, Mike. No fight,' " and defendant responded, " 'Get out, Salvador. Get out of my house.' " Saavedra ran because he was afraid defendant would hit him, too.

Saavedra had seen defendant be violent with Paulsen before. He once saw defendant drag Paulsen from the homeless encampment toward his apartment by her hair while she screamed. Defendant was accusing Paulsen of stealing from him.

Around 9:00 a.m. on June 15, 2013, Anthony Barton found Paulsen's body by the train tracks near his trailer in Morgan Hill. Paulsen's pants were down and a jacket was over her head, covering her face.

Morgan Hill Police Officer William Jurevich responded to the report of a possible dead body. Based on information received from Barton, Officer Jurevich contacted defendant outside his apartment. Officer Jurevich asked if he could enter the apartment, but defendant asked why he needed to, so they spoke outside. Defendant asked Officer Jurevich what happened, and Officer Jurevich responded, "[Y]ou know what happened,"

---

[2] The trial court deemed Saavedra unavailable as a witness. Saavedra's preliminary hearing testimony was read into the record at trial.

and asked defendant where Paulsen was. Defendant said that on the 14th, Paulsen had come over with someone named "Miguel" and then left with Miguel to sell clothing. Defendant denied fighting with Paulsen on the 14th, but admitted they had been in arguments before. They had never physically fought with each other. Defendant stated that on the 14th, he rode his bike, arrived home around 1:00 p.m., and Paulsen came over around 6:00 or 7:00 p.m. Defendant said that he "played the blues until 9:00." Defendant indicated he last saw Paulsen from 10:00 to 10:30 on the 14th.

Officer Jurevich headed toward the homeless encampment to try to contact Miguel. About 50 yards north of Paulsen's body, Officer Jurevich found a bloody tank top and a pair of women's shoes.

Forensic pathologist Joseph O'Hara performed Paulsen's autopsy. Paulsen had "abundant blunt force injuries on all body surfaces." The injuries were caused by Paulsen striking something, or being struck by something, firm. Paulsen's sternum, first and second vertebrae, and multiple ribs on her left and right side were fractured. Paulsen's neck was "basically broken." Her entire skull was covered by hemorrhage from multiple impacts and there was abundant hemorrhage in her brain. Paulsen's manner of death was homicide and the cause of death was multiple blunt force injuries, including cervical vertebral fracture. Paulsen's injuries were not consistent with someone falling to the ground. Paulsen's injuries were consistent with being "beaten to death."

After the police obtained a search warrant, on June 16, 2013, crime scene analyst Jeremiah Garrido located a baseball bat in the bedroom of defendant's apartment. The bat had reddish brown stains that tested positive for blood. Garrido also found blood stains in nine locations in the bedroom, including around the bed, on the bedding, and on a wall. The bathroom also had a possible blood stain. Paulsen's identification card was found inside a backpack on the living room floor.

Santa Clara County criminalist Teresa Shab analyzed the baseball bat found in defendant's apartment and developed a DNA mixture profile of at least two people from

a dark brown stain on the bat's grip. Paulsen was the source of the major component of the DNA profile and defendant was included as a possible contributor to the minor component. Shab also developed a DNA mixture profile of at least two people, at least one of whom was male, from a contact sample on the bat's grip. Paulsen was the source of the major component of the DNA profile and defendant was included as a possible contributor to the minor component. Finally, Shab developed DNA profiles from the red/brown stains on the head of the baseball bat and below the grip of the bat. Paulsen was the source of the DNA profile developed from those stains.

Morgan Hill Police Detective Melinda Zen interviewed defendant in the early morning hours of June 16. Detective Jason Broyer also participated in the interview. The initial interview lasted three hours. Defendant denied engaging in any violence with Paulsen and denied killing her. Detective Zen tried to establish a timeline of defendant's whereabouts for the preceding 24 hours, but his timeline shifted and was inconsistent. Defendant wrote a letter to Paulsen's family saying that he loved her and she was his best friend.

After a break in the interview, defendant asked to talk to Detective Zen alone. Defendant told Detective Zen that he was scared to say what happened. Defendant said that on June 14, he and Paulsen drank whiskey and some beer at his apartment. They got into an argument because he found out that she had "prostitut[ed] herself" a long time ago. Defendant stated that he struck Paulsen on the torso three or four times with an open hand. Defendant also described punching her. Defendant said that when he struck her, Paulsen fell back onto the carpet and was unresponsive.

Defendant denied using a weapon, breaking Paulsen's neck, or kicking or stomping on Paulsen. Detective Zen told defendant that the autopsy photos showed that Paulsen had severe injuries and her ribs may have been broken. Defendant said that he did not know how those injuries happened. Detective Zen told defendant there was a baseball bat with blood on it. Defendant repeatedly denied hitting Paulsen with the bat.

Defendant said that before the argument, they were going to have sex and Paulsen took off her blouse, which is why her body was partially clad when it was found. Defendant stated that he removed her body from his apartment between 1:00 and 2:00 a.m. He used a shopping cart he found on the sidewalk to transport her toward the railroad tracks. Detective Zen asked why Paulsen's pants were down and defendant said that somebody must have messed with her after he left her there. Defendant said that he put the jacket over Paulsen's face because he did not want anyone to see her that way. Detective Zen asked defendant about the shoes and underwear found approximately 100 yards away from Paulsen's body near the homeless encampment, and defendant denied that he put the items there and that he was trying to frame the homeless people living in the encampment.

On June 17, 2013, Detective Zen found a shopping cart in the area where Paulsen's body was located. The cart was standing up and appeared to have blood spatter on it and hair that matched Paulsen's hair color.

B. ***Defense Evidence***

Defendant called several witnesses to testify regarding the effects of his alcoholism and alcohol withdrawal. Defendant also testified.

Marriage and family therapist Osun Yoo testified that on June 18, 2013, she performed a custody crisis welfare assessment on defendant at the Santa Clara County jail. Yoo stated that defendant told her, " 'I'm thinking of running my head into the wall. I keep hearing my girlfriend's voice calling to me. I miss her. The walls keep moving. I haven't slept in two days. Please help it stop.' " Defendant was "agitated, tearful, scared and . . . incoherent" and appeared to be a danger to himself. Yoo recommended that defendant be placed on a psychiatric hold for stabilization and assessment.

Dr. Amarjit Grewal testified as an expert in psychiatry. Dr. Grewal worked as a psychiatrist in the Santa Clara County jail in June 2013. On June 18, 2013, defendant was admitted into the jail's acute psychiatric unit. Defendant was suffering from alcohol

withdrawal and was prescribed medication to treat the withdrawal. Dr. Grewal stated that patients suffering from alcohol withdrawal generally experience tremors, anxiety, vomiting, confusion, increased heart rate, sweating, restlessness, and agitation. Seizures can also occur. Dr. Grewal testified that alcohol withdrawal is a medical emergency.

Defendant testified that he did not kill Paulsen. He last saw her alive on June 14 or 15 around 10:30 or 11:00 p.m. He had been drinking tequila and beer with a friend and when he got home Paulsen was there. Paulsen was often at his apartment, but she did not live there. She mostly lived at the homeless encampment. Sometimes her boyfriend Fernando came to defendant's apartment to get her. Fernando did not like Paulsen being with defendant.

Defendant stated that on the 14th or 15th, he and Paulsen talked and watched a movie while they drank whiskey and beer. Before they were about to have sex, Paulsen took a big swig of whiskey and fell back on the bed. Defendant drank some more and asked Paulsen whether she wanted more alcohol. Paulsen did not respond. Defendant told her that if she did not want any more, he would drink it himself, and finished most of the bottle. Paulsen still did not say anything. Defendant pulled Paulsen up by her wrist and saw blood coming out of the side of her head. Defendant put his left hand on the right side of Paulsen's head. Defendant laid Paulsen back down on the bed and "blew in her mouth because [he] thought she was just knocked out." Defendant stated that the air he blew into Paulsen's mouth "came back out" like a "doll crying."

Defendant testified that he went into the bathroom and almost fell into the bathtub. He used his hand to brace himself, leaving a bloody handprint on the wall. The whiskey was kicking in. Defendant went to the sink, washed the blood off his hand, and "took off outside." Defendant did not see anyone but found a shopping cart that he brought to his house. He put Paulsen inside the cart. He did not know whether she was still breathing. Defendant stated that he pushed Paulsen in the cart along a trail. He got tired and eventually took her body out of the cart and put it in the grass.

Defendant testified that he had no memory of injurying Paulsen. He stated that he did not call the paramedics because he "knew people would be out there all the time, and [he] was gonna ask some of [his] friends." He was afraid to call the paramedics and his phone had been destroyed in a wreck.

Defendant stated that the next morning, Ralph Reyes came to his apartment and asked him what happened to Paulsen. Defendant asked Reyes what he was talking about. Reyes started to explain and defendant remembered that something had happened. Shortly after speaking to Reyes, the police contacted him. Defendant spoke to Detectives Zen and Broyer later that evening.

Defendant testified that he began to feel the symptoms of alcohol withdrawal when he was at the police station. Once he got to the jail he started to hallucinate and saw lines moving on the wall and things on the floor. Defendant heard "[s]ounds like ocean waves, a million voices speaking." He also started shaking a little bit. He felt like he had been run over by a truck. He could not get comfortable and did not get any sleep.

Defendant stated that he started drinking when he was about 18 years old. Doctors had told him that he needed to quit. At one point in his life, he used LSD and crystal methamphetamine.

Defendant testified that he had no memory of using a baseball bat to strike Paulsen. Defendant stated that he had never seen the shopping cart that was in the courtroom and he did not think Paulsen would have fit inside that cart. He used a square cart from Wal-Mart. Defendant did not remember Saavedra coming to his apartment on June 14.

On cross-examination, defendant admitted that he told Detective Zen that he struck Paulsen with an open hand at least three times. Defendant stated that he had been up all night when Detective Zen questioned him and he was not sure what she was asking him. His mind was not working right. Defendant testified that he used the baseball bat to play baseball with his grandchildren but acknowledged that he told Detectives Zen and

Broyer that he had the bat in his house for self-defense. Defendant testified that he did not know how Paulsen's blood got on the bat.

Defendant stated that when Paulsen fell back on the bed, she hit her head on the bedframe. When he picked her up, blood was pumping out by her right temple. Defendant acknowledged that he told Detective Zen that Paulsen fell and hit her head on the carpet. Defendant did not know how Paulsen's eyes became swollen shut.

Defendant admitted that he was convicted in 1992 of "a violent act against a female."

Dr. Martin Howard Williams testified as an expert in forensic psychology. Dr. Williams diagnosed defendant with "alcohol use disorder, severe, in a controlled environment" and "adjustment disorder with depressed mood." Alcohol use disorder is "serious alcoholism." Dr. Williams opined that defendant was a chronic alcoholic and was alcohol dependent. Dr. Williams stated that defendant also had "perceptual distortion." When defendant sees a pattern of lines, they appear to move, which could be a neurological issue caused by his years of heavy drinking.

Dr. Williams testified that defendant reported to him that he had suffered alcohol withdrawal before and that he had also experienced blackouts. Dr. Williams explained that when a person blacks out from alcohol, he or she can still function and those around him or her may not know that the person has blacked out. After the blackout, the person will have no memory of what occurred and the memory will never be recovered. Dr. Williams stated that people who have blacked out often try to piece together events that occurred during the blackout. If someone puts together a memory about what occurred and stays sober, that will become the person's story. The term "brownout" refers to when a person goes in and out of a blackout.

Dr. Williams stated that defendant told him that on June 15, 2013, Paulsen came over to his apartment. According to defendant, they were drinking whiskey, passing the bottle back and forth. Defendant said that at one point, Paulsen took a swig from the

bottle, fell backwards, and hit her head on a part of the futon she was sitting on. Paulsen became unresponsive and defendant tried to administer CPR, which caused Paulsen to make a strange noise. Defendant believed Paulsen was still alive. Defendant told Dr. Williams that he put Paulsen into a shopping cart and wheeled her to a homeless encampment, hoping someone would take care of her because he did not know what to do. Defendant believed Paulsen was still alive when he left her and stated that her head was "flopping around loosely." Dr. Williams testified that defendant denied striking Paulsen and denied removing Paulsen from the shopping cart and dragging her to the railroad tracks where her body was found.

When asked to assume that defendant had killed Paulsen, Dr. Williams stated that defendant was not "necessarily intentionally misstating his understanding of what occurred." Dr. Williams opined that defendant did not actually know what happened because he was in a period of blackout or brownout. Dr. Williams believed that defendant had since tried to piece together what occurred based on things he heard and based on what he hoped had happened, as most people do not want to believe they harmed someone they cared about.

Dr. Williams stated that the psychological phenomenon of denial also may have impacted defendant's memory of the event. According to Dr. Williams, if something happened that defendant considers reprehensible, he may have kept it out of his mind based on his psychological need to see himself as a decent person. The combination of piecing together what happened based on limited memory and blocking something from memory based on psychological need is often involuntary; it is not the same as intentionally fabricating a story or telling a lie.

Dr. Williams testified that alcohol intoxication severely impairs a person's judgment, which impacts a person's behavior. Based on the nature of Paulsen's injuries, Dr. Williams believed the crime could have been committed by someone who was extremely drunk and whose judgment was so impaired that the person had no awareness

of the extent of harm he or she was inflicting or the consequences of what he or she was doing.

When asked to assume that defendant did not kill Paulsen, Dr. Williams stated that a person coming out of a blackout or brownout who has no memory of an event may be open to suggestion about what occurred, meaning that he or she integrates information received later that becomes his or her memory, whether or not it is true.

On cross-examination, Dr. Williams acknowledged that there was not necessarily any information during defendant's police interview with Detectives Broyer and Zen that the detectives suggested to defendant that defendant parroted back to them and there was information in defendant's statement that the officers had not been aware of. Dr. Williams stated that the killer's conduct was simple and repetitive and consistent with alcohol impairment. A rational person would have stopped his or her conduct once the victim was dead, but a person severely impaired by alcohol would fail to recognize that the victim was dead and would keep going. Dr. Williams testified that some of defendant's behavior, such as his movement of Paulsen out of his home, his staging of her body to look like a sexual assault, and his decision to deny police entry to his apartment, was consistent with the rational behavior of a killer.

C. *Charges, Verdict, and Sentence*

Defendant was charged with murder (§ 187). A jury found him guilty of murder in the second degree.

The trial court sentenced defendant to 15 years to life.

III. DISCUSSION

A. *Exclusion of Impeachment Evidence*

Defendant contends that the trial court abused its discretion under Evidence Code section 352 and violated his Sixth Amendment right to confront witnesses against him when it prohibited defendant from cross-examining Detective Zen about an incident in 2011 involving police misconduct. The Attorney General counters that the trial court did

not abuse its discretion when it disallowed the evidence because the evidence did not bear on Detective Zen's credibility and would have consumed an undue amount of time. The Attorney General asserts that defendant's Sixth Amendment claim has been forfeited and is meritless.

1. Trial Court Proceedings

During trial, defendant moved for an Evidence Code section 402 hearing to allow him to examine Detective Zen about an incident in 2011 where she posted a topless photo of a woman on the woman's Facebook page that was obtained from the woman's cell phone while she was under arrest. Defendant attached two newspaper articles regarding the event to his motion.

According to one article, two women who had been drinking arrived home to find a patrol car blocking their driveway and they photographed the vehicle. The officer who had left the car in the driveway then wrongfully arrested the women for public drunkenness. Upon their release, the women reported that the phone used to photograph the patrol car had been tampered with and some of the photographs had been deleted.

According to the article, a trial court determining a wrongful termination suit filed by the officer who arrested the women found that an internal investigation by the Morgan Hill Police Department concluded that Detective Zen, a corporal at the time and the officer's supervisor, "had uploaded [the woman's] photograph depicting a 'naked breast' onto [the woman's] Facebook account while she was in custody." The article stated that Detective Zen "testified during the internal investigation that she 'inadvertently' uploaded the photo to Facebook, and she did not know [the other officer] had deleted any photographs from [the woman's] phone." The article observed that "[c]ity staff listings showed [Detective] Zen was demoted to the rank of officer . . . shortly after the 2011 incident." In addition to the wrongful termination action, the article mentioned that the woman brought a claim against the city that was settled and that the Santa Clara County

District Attorney did not recommend filing charges against the officer who made the bad arrest.

Defendant argued that the incident demonstrated that Detective Zen was "sloppy and mishandled evidence in the past," which was relevant because she found "significant items of evidence" in this case, including the shopping cart, and she was the sole officer to hear his confession. Defendant asserted that Detective Zen's conduct pertained to her credibility and "whether she handled items with care." Defendant added, "[T]his happened in 2011. This case happened in 2013. You can argue that she's trying to get back in good graces in other things by how she conducted herself in this case and what she was able to recover." When the trial court inquired whether defendant's statement to Detective Zen had been recorded, defendant responded, "It is not recorded well." Defendant stated that he intended to introduce the facts of the incident to the jury by questioning Detective Zen and implied that he would use the newspaper articles in his examination if necessary.

The trial court asked defendant to identify "irregularities that [he] would attribute to Detective Zen and the handling or processing of evidence in this case." Defendant responded that Detective Zen found the shopping cart allegedly used to transport Paulsen's body and that the police report states that the shopping cart was lying down, but photographs show it was standing up. Defendant asserted that this was "changing and moving evidence perhaps." Defendant stated that he thought Detective Zen was also involved in finding another piece of evidence a couple of days after his arrest. Defendant contended that because police officers are given deference by the public and jurors who think they handle evidence appropriately and follow procedures, "the implication is that she did; but the only way we know that is because she says so; but if there is a situation in the past where she hasn't, . . . that can cause questions as to whether she did everything appropriately this time."

The prosecution argued that "[t]his is the classic definition of litigating another case. It is a waste of time." The prosecution asserted there was "no serious dispute" about what occurred here "as it relates to evidence relating to this detective" and that defendant's statement was recorded. The prosecution stated that the shopping cart had been photographed next to Paulsen's body at the scene and that it only became significant to the police when defendant mentioned it in his interview. Detective Zen went back to the scene 24 to 36 hours after the homicide and located the cart. The prosecution argued that the cart's position when Detective Zen found it in a fairly well traveled area was not relevant and that it could not be disputed based on the photograph that the cart had been there two days beforehand. When the trial court asked whether there was any forensic evidence located on the cart, the prosecution responded that Paulsen's blood and hair were on the cart.[3]

The trial court determined that the information pertaining to Detective Zen was "salacious" and "tend[ed] to be not very helpful to the jury." The court observed that there did not appear to be "any serious evidentiary . . . concerns about the quality of the evidence in this case." The court found that defendant's statement had been recorded, however poorly, and that there was not "much there" with the cart because it appeared in a photograph taken while Paulsen's body was still at the scene and perhaps before Detective Zen had become involved with the case. The court stated, "[T]he fact that [Detective Zen] may have done something stupid . . . I just don't think it is very helpful to this jury and I don't think there's much they can reasonably infer. It would take a great deal of time to rundown. Obviously, it took a great deal of litigation." The court concluded, "Accordingly, primarily under Evidence Code [s]ection 352, I find that the prejudicial value of wasted time and the distraction by the salacious nature of the

[3] No evidence was admitted at trial that the blood and hair on the cart were determined to be Paulsen's.

allegations in a serious homicide case would tend to distract the jury and would not be very helpful for them either in considering Detective Zen's credibility or the handling of the evidence in this case. Accordingly, the defense motion for [the] 402 [hearing] and subsequently asking Detective Zen about the incident . . . is denied."

2. Exclusion Under Evidence Code Section 352

Under Evidence Code section 352, a trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) "A trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207.)

We review a trial court's decision to exclude evidence pursuant to Evidence Code section 352 for an abuse of discretion. (*People v. Lightsey* (2012) 54 Cal.4th 668, 714.) " 'An exercise of discretion under Evidence Code section 352 will be affirmed unless it was arbitrary, capricious, or patently absurd and the ruling resulted in a miscarriage of justice.' " (*People v. Bell* (2019) 7 Cal.5th 70, 105 (*Bell*).) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*People v. Clark* (2011) 52 Cal.4th 856, 932.)

Defendant argues that Detective Zen's 2011 conduct was probative of her character for honesty and veracity because it "constituted a massive breach of trust society expects from police officers," and that since Detective Zen was the lead investigator in this case, it was "imperative . . . that the jury found Detective Zen's testimony about her investigation credible." Defendant contends that the trial court's ruling was arbitrary and capricious because defendant informed the court that he would

elicit the facts of the 2011 event solely by questioning Detective Zen, which would not have consumed an undue amount of time, the court "could have easily sanitized any perceived salaciousness," and the jury would have understood that "Detective Zen's prior misconduct may reflect poorly on her credibility as a police investigator, and thus on her testimony in this case."

We conclude that the trial court did not abuse its discretion when it excluded the evidence.

The trial court determined that evidence of Detective Zen's 2011 conduct was "salacious . . . [and] tend[ed] to be not very helpful to the jury," focusing on the fact that Detective Zen's interview of defendant had been recorded, albeit poorly, and the fact that the shopping cart found by Detective Zen had been photographed at the crime scene before Detective Zen located it. We agree that evidence of Detective Zen's alleged conduct in the 2011 incident would have had limited probative value because of the topics addressed by Detective Zen's trial testimony and the state of the evidence in the case.

Detective Zen testified to three aspects of the investigation: (1) her interview of Saavedra; (2) her interview of defendant; and (3) her location of a shopping cart at the crime scene after defendant's interview.

Detective Zen's testimony regarding her interview of Saavedra was very brief. Other than her statement that she interviewed Saavedra on June 16, her testimony was entirely cumulative of Saavedra's preliminary hearing testimony, which was read into the record at trial because he was unavailable as a witness.

Detective Zen also testified about her interview of defendant, the first three hours of which she conducted with Detective Broyer. As the trial court observed, defendant's interview was recorded. Although the audio recording of the interview was "really hard to hear," defendant could have impeached Detective Zen with the recording had her testimony regarding his statements been untruthful. Instead, defendant's trial testimony

reflected that Detective Zen's statements regarding the interview were accurate. For example, defendant testified that he told Detective Zen that he struck Paulsen with an open hand at least three times, which was consistent with Detective Zen's testimony. Defendant also acknowledged that he told Detective Zen that Paulsen fell and hit her head on the carpet.

Finally, the fact that it was Detective Zen who located the shopping cart was of limited relevance, as was the shopping cart's position when she found it, because it was defendant who informed Detective Zen that he had transported Paulsen in a shopping cart and the cart found by Detective Zen appeared in a photograph of the crime scene. The photograph was taken the day Paulsen's body was found, which was one day before defendant's interview and two days before Detective Zen located the cart. Defendant also testified that he put Paulsen in a shopping cart and pushed her in the cart until he got tired and left her body in the grass. Although Defendant testified that he used a different cart than the one that was in the courtroom during trial, presumably the jury would have been able to determine if the cart in the courtroom and the cart in the photograph were the same or similar. The cart located by Detective Zen was itself of limited evidentiary value given defendant's admission and the crime scene photograph, and there was no testimony at trial that the shopping cart had been tested for biological fluids or DNA.

Weighing against the 2011 incident's limited probative value based on Detective Zen's testimony and the other evidence in the record is the "substantial danger of undue prejudice" attendant with evidence of the 2011 incident. (Evid. Code, § 352.) "The evidence barred by Evidence Code section 352 is evidence that uniquely causes the jury to form an emotion-based bias against a party and that has very little bearing on the issues of the case." (*People v. Thornton* (2007) 41 Cal.4th 391, 427.) Given the nature of the police misconduct involved in the 2011 incident, which included a false arrest and the inadvertent posting on Facebook of a wrongfully obtained photograph depicting a " 'naked breast,' " it was reasonable for the trial court to determine that the jury would be

distracted "by the salacious nature of the allegations." And while defendant asserts that the trial court could have sanitized the evidence, defendant did not suggest that below. Even if the trial court could have prohibited defendant from introducing the fact that the photograph included nudity, the nature of the alleged police misconduct was more prejudicial than probative under the circumstances of this case.

" ' "[E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." ' " (*Bell, supra*, 7 Cal.5th at p. 105.) It was reasonable for the trial court to determine that such was the case with the evidence of the 2011 incident proffered here. Indeed, the discretion afforded by Evidence Code section 352 "allows the trial court broad power to control the presentation of proposed impeachment evidence ' " 'to prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues.' [Citation.]" ' " (*People v. Mills* (2010) 48 Cal.4th 158, 195.)

In addition, the trial court found that introduction of the 2011 incident would have entailed an undue consumption of time. Had the defense presented the proffered evidence, the prosecution would have had an opportunity to present rebuttal evidence, potentially leading to a mini-trial of the incident. Given the evidence's limited probative value based on Detective Zen's testimony and the other evidence in the record, it was reasonable for the trial court to implicitly find that the evidence's "probative value [was] substantially outweighed by the probability that its admission [would] . . . necessitate [an] undue consumption of time." (Evid. Code, § 352.)

For these reasons, we conclude that the trial court did not abuse its discretion when it excluded evidence of the 2011 incident to impeach Detective Zen.

3. Sixth Amendment Confrontation Right

Defendant contends that the trial court's exclusion of evidence pertaining to the 2011 incident violated his Sixth Amendment right to confront witnesses against him. However, defendant failed to raise his Sixth Amendment claim below. Therefore, the claim has been forfeited. (See *People v. Tafoya* (2007) 42 Cal.4th 147, 166; *People v. Burgener* (2003) 29 Cal.4th 833, 869.)

Even assuming defendant preserved his Sixth Amendment claim, it is without merit. "The object of the confrontation clause is to 'ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.' " (*People v. Cooper* (2007) 148 Cal.App.4th 731, 740.) However, "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. [Citation.]" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 295.) Trial courts retain wide discretion under the confrontation clause to impose reasonable limits on cross-examination based on concerns such as harassment, prejudice, confusion of the issues, or interrogation that is repetitive or only marginally relevant. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 (*Van Arsdall*).) "In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352." (*People v. Quartermain* (1997) 16 Cal.4th 600, 623 (*Quartermain*).)

"[R]eliance on Evidence Code section 352 to exclude evidence of marginal impeachment value . . . generally does not contravene a defendant's constitutional rights to confrontation and cross-examination." (*People v. Brown* (2003) 31 Cal.4th 518, 545.) "A trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted." (*Quartermain*, *supra*, 16 Cal.4th at pp. 623-624.)

Here, the trial court's decision to exclude evidence of Detective Zen's alleged conduct in the 2011 incident based on its concerns that the evidence would inflame the emotions of the jury and was only marginally relevant under the circumstances of the case, fell squarely within the court's broad discretion to impose reasonable limits on cross-examination. (*Van Arsdall, supra*, 475 U.S. at p. 679.) Viewing the 2011 evidence objectively, we believe that given Detective Zen's limited trial testimony and the other evidence presented at trial, a *reasonable* jury would not have had "a *significantly* different impression of [Detective Zen's] credibility had the excluded cross-examination been permitted." (*Quartermain, supra*, 16 Cal.4th at p. 624, italics added.)

4. Assuming Error, Defendant Was Not Prejudiced

Even if we were to assume that the trial court's exclusion of the impeachment evidence constituted an abuse of discretion under Evidence Code section 352 and violated defendant's Sixth Amendment confrontation right, we would find the error harmless under either *Watson* or *Chapman*. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 [for state law errors, assessing whether it is "reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error"]; *Chapman v. California* (1967) 386 U.S. 18, 24 [beyond-a-reasonable-doubt harmlessness standard for errors of constitutional magnitude].)

The evidence against defendant was strong. Saavedra testified that he heard defendant arguing with Paulsen and then hitting her while Paulsen and defendant were in defendant's bedroom on the night of the homicide, and he had seen defendant be violent with Paulsen before. When initially contacted by police after Paulsen's body was discovered, defendant denied fighting with Paulsen and stated that they had never physically fought. After his arrest, defendant denied during his three-hour interview with Detectives Zen and Broyer that he had been violent with Paulsen. After a break in the interview, defendant spoke with Detective Zen alone and stated that he had struck Paulsen on the torso three or four times with an open hand, causing Paulsen to fall back

onto the carpet and become unresponsive. Defendant denied using a weapon or breaking Paulsen's neck. At trial, defendant testified that Paulsen took a big swig of whiskey, fell back and hit her head on the bedframe, became unresponsive, and started bleeding.

A forensic pathologist determined that Paulsen had been beaten to death. Her neck, sternum, two of her vertebrae, and several of her ribs were broken. Paulsen's injuries were consistent with being hit by something firm.

Police found a baseball bat with blood on it in defendant's bedroom. Paulsen's DNA was located on the bat. Police also found blood stains in nine locations in the bedroom, a possible blood stain in the bathroom, and Paulsen's identification card in a backpack in the living room.

In contrast to the strength of the evidence against defendant, the probative value of the impeachment evidence was minimal because, as we explained above, Detective Zen's trial testimony was limited and corroborated by other evidence.

For these reasons, even if we were to assume that the trial court erred when it disallowed the impeachment evidence against Detective Zen, we would conclude that the error was harmless under any standard.

B. *Mental Health Diversion*

Defendant contends that we should conditionally reverse the judgment and order a limited remand for the trial court to determine his eligibility for mental health diversion under section 1001.36, which was enacted after defendant's conviction in this case. The Attorney General counters that section 1001.36 does not apply retroactively to individuals, like defendant, who were tried and convicted before section 1001.36 went into effect.[4] In addition, the Attorney General asserts that defendant's conviction of murder renders him statutorily ineligible for mental health diversion.

---

[4] The Attorney General has requested that we take judicial notice of a "document . . . taken from the legislative history of the enactment of Assembly Bill (continued)

Defendant murdered Paulsen in June 2013. Defendant was tried in October 2017, convicted on November 1, 2017, and sentenced on January 19, 2018. Effective June 27, 2018, the Legislature created a "[p]retrial diversion" program for certain defendants who suffer from a diagnosed and qualifying mental disorder if the mental disorder played a significant role in the commission of the charged offense. (§ 1001.36, subd. (b), added by Stats. 2018, ch. 34, § 24.) About three months after the statute took effect, the Legislature amended section 1001.36 to exclude defendants charged with murder or voluntary manslaughter, among other crimes. (§ 1001.36, subd. (b)(2), added by Stats. 2018, ch. 1005, § 1.) The amendment became effective on January 1, 2019. (See Cal. Const., art. IV, § 8, subd. (c), par. (1); Gov. Code, § 9600, subd. (a).)[5]

The Courts of Appeal are divided on whether section 1001.36 applies retroactively, and the issue is currently pending before the California Supreme Court. (Compare, e.g., *People v. Khan* (2019) 41 Cal.App.5th 460, rev. granted Jan. 29, 2020, S259498 and *People v. Craine* (2019) 35 Cal.App.5th 744, rev. granted Sept. 11, 2019, S256671, with *People v. Weaver* (2019) 36 Cal.App.5th 1103, rev. granted Oct. 9, 2019, S257049 (*Weaver*), and *People v. Frahs* (2018) 27 Cal.App.5th 784, rev. granted Dec. 27, 2018, S252220 (*Frahs*).) We need not decide the issue here because whether we determine that the statute operates prospectively or retroactively, defendant is not entitled to relief. Assuming without deciding that section 1001.36 applies retroactively to judgments not yet final on appeal, defendant is statutorily ineligible for mental health diversion due to the statute's 2019 amendment. (See *People v. McShane* (2019) 36 Cal.App.5th 245, 259, rev. granted Sept. 18, 2019, S161037 (*McShane*); *People v.*

(A.B.) No. 1810 (2017-2018 Reg. Sess.)," which the Attorney General asserts is relevant to the intent of the Legislature in enacting section 1001.36. Defendant has not filed an opposition to the request. We grant the request for judicial notice. (See Evid. Code, §§ 452, subd. (c), 459.)

[5] Section 1001.36 was amended again on October 3, 2019, for nonsubtantive changes effective January 1, 2020. (Stats. 2019, ch. 497, § 203.)

Cawkwell (2019) 34 Cal.App.5th 1048, 1053, rev. granted Aug. 14, 2019, S256113 (*Cawkwell*).)

In *Cawkwell*, *supra*, 34 Cal.App.5th at page 1053, the defendant argued that "the ameliorative provisions of the mental health diversion statutes apply retroactively to his case, while the subsequent amendment eliminating eligibility for sex offenders (like him) cannot apply retroactively due to ex post facto considerations." The Court of Appeal rejected the contention that retroactive application of the 2019 amendment violated the ex post facto clauses. (*Ibid.*) The court explained that a statute violates the prohibition against ex post facto laws " 'if it punishes as a crime an act that was innocent when done or increases the punishment for a crime after it is committed.' " (*Id.* at p. 1054.) "The ex post facto prohibition ensures that people are given 'fair warning' of the punishment to which they may be subjected if they violate the law; they can rely on the meaning of the statute until it is explicitly changed." (*Ibid.*) The court reasoned that when the defendant committed his crimes "between November 2015 and April 2016, the possibility of pretrial mental health diversion did not exist. The initial version of section 1001.36 was not enacted until more than two years later, in June 2018. Consequently, [the defendant] could not have relied on the possibility of receiving pretrial mental health diversion when he [committed his crimes]." (*Ibid.*)

In addition, the Court of Appeal determined that the January 1, 2019 amendment "did not make an act unlawful that was not formerly unlawful, nor did it increase the punishment for the offenses with which [the defendant] was charged." (*Cawkwell*, *supra*, 34 Cal.App.5th at p. 1054.) "That is, [the defendant] was subject to the same punishment when he committed his offenses as he was after the Legislature narrowed the scope of defendants eligible for diversion." (*Ibid.*) For those reasons, the court held that application of the amendment to the defendant did not violate the ex post facto clauses of the state or federal Constitutions, rendering defendant ineligible for the program. (*Ibid.*; see also *McShane*, *supra*, 36 Cal.App.5th at p. 260 [finding no ex post facto violation

because "the enactment of the murder exclusion did not change the consequences of his crime *as of the time he committed it*"].)

Here, defendant committed his offense five years before the Legislature enacted section 1001.36. Because the statute was enacted after defendant perpetrated the crime, he could not have relied on the possibility of receiving mental health diversion when he committed the offense, and the retroactive application of the 2019 amendment does not change the consequences of his crime as of the time he committed it. Accordingly, the 2019 statutory amendment applies to render defendant statutorily ineligible for mental health diversion because he was charged with murder. (§ 1001.36, subd. (b)(2)(A).)

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

I CONCUR:

PREMO, ACTING P.J.

I CONCUR IN THE JUDGMENT ONLY:

MIHARA, J.

People v. Sheppard
H045521